# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1956

# No. 834

SAM ACHILLI, PETITIONER,

*vs.*

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## INDEX


| | Original | Print |
|---|---|---|
| Record from the U.S.D.C. for the Northern District of Illinois, Eastern Division | 1 | 1 |
| Docket entries | b | b |
| Clerk's certificate | e | e |
| Prefix to record pursuant to Rule 12 (c) | 1 | 1 |
| Placita (omitted in printing) | 3 | |
| Indictment | 4 | 3 |
| Mandate of the United States Court of Appeals for the Seventh Circuit | 8 | 5 |
| Motion to correct or reduce sentence and petition for stay of mittimus | 12 | 6 |
| Transcript of proceedings on hearing on the motion to correct or reduce sentence | 14 | 7 |
| Reporter's certificate (omitted in printing) | 24 | |
| Motion of defendant to correct the judgment and commitment, etc. | 25 | 12 |
| Order amending judgment and commitment to conform to mandate | 27 | 13 |
| Order denying motion to correct and granting motion to reduce sentence | 29 | 14 |


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—4637-5

| | Original | Print |
|---|---|---|
| Record from the U.S.D.C. for the Northern District of Illinois, Eastern Division—Continued | | |
| Memorandum opinion, Knoch, J., with respect to order denying motion to correct sentence and granting motion to reduce sentence | 30 | 15 |
| Defendant's notice of appeal | 32 | 16 |
| Order fixing appeal bond, etc. | 35 | 17 |
| Amended notice of appeal | 36 | 18 |
| Stipulation of record on appeal | 39 | 19 |
| Statement pursuant to Rule 12 (d) of the United States Court of Appeals for the Seventh Circuit | 41 | 20 |
| Certificates of clerks | 42 | 21 |
| Proceedings in U.S.C.A. for the Seventh Circuit | 45 | 23 |
| Motion to consolidate record | 45 | 23 |
| Motion for the entry of an order granting leave to file affidavit of Peter B. Atwood for the purpose of enlarging grounds, etc. | 46 | 24 |
| Affidavit of Peter B. Atwood | 47 | 25 |
| Government's objections to defendant-appellant's motion, etc. | 55 | 32 |
| Notice of and emergency motion to certify record for petition for certiorari before judgment | 59 | 34 |
| Order denying motion to enlarge grounds, granting motion to consolidate record, etc. | 61 | 35 |
| Order continuing case | 62 | 36 |
| Clerk's certificate | 63 | 37 |
| Order allowing certiorari | 64 | 38 |

A

IN UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

JUDGE KNOCH

CRIMINAL CALENDAR

| TITLE OF CASE | ATTORNEYS |
|---|---|
| THE UNITED STATES **11971** | *For U. S.:* ROBERT TIEKEN, ~~Otto Kerner, Jr., U. S. Atty.~~ |
| vs. | |
| SAM ACHILLI | |
| 732 Brook St. | |
| Elgin, Ill. | ACHILLI - Peter B. Atwood 10 So. LaSalle St. |
| | *For Defendant:* RA 6-9060 |
| | withdrawn ~~Joseph A. Struett 105 W. Madison St~~ |
| | Anna R. Lavin, 1 No. LaSalle St. RA 6-7855 |
| | ~~F. A. Ferrari 325 W. North~~ |
| withdrawn | Ave., Chicago, Illinois |
| Sub- | ~~Frank J. Cayen, Jr. 29 S. LaSalle St~~ |
| | Carl J. Better |
| | 910 17th St. N.W. |
| | Washington 6, D. C. |

| ~~STRIKE OR COSTS~~ | AMOUNT | CASH RECEIVED AND DISBURSED | | | | |
|---|---|---|---|---|---|---|
| | | DATE | NAME | RECEIVED | | DISBURSED |
| | | 4-24-55 | F.B. - Not. Appeal | 5 | 00 | |
| | | 6-21-55 | - Trans. C.A. 182 | | | 5 00 |
| | | 9-22-55 | - Fees - Dr. Appeal | 48 | 45 | |
| | | 9-26-55 | - Clk. C.A. 77 | | | 48 45 |
| | | 6-21-55 | - Trans. C.A. 182 | | | 5 00 |
| | | 9-22-55 | - Fees - Dr. Appeal | 48 | 45 | |
| | | 9-26-55 | - Clk. C.A. 77 | | | 48 45 |
| | | 1-4-56 | Appeal | 5 | 00 | |
| | | 1-18-56 | Trans. to C.A. 182 | | | 5 00 |

~~DISPOSITION~~

| DATE | PROCEEDINGS | CLERK'S FEES | |
|---|---|---|---|
| | | PLAINTIFF | DEFENDANT |
| | VIO.: Sec. 145(b), Int. Rev. Code; 26 U.S.C., Sec.145(b) (Wilfully and knowingly attempting to defeat & evade large parts of the income tax due & owing by him to the U. S. by filing & causing to be filed with the Coll. of Int. Rev. false & fraudulent income tax returns.) | | |

A

DOCKET ENTRIES

| DATE | PROCEEDINGS | CLERK'S FEES PLAINTIFF |
|---|---|---|
| 3-9-53 | Filed Indictment (3) (JS-2) | 15 00 |
| 3-9-53 | Order to issue bench warrant and fix bond at $5,000.00 - BARNES, J. | |
| 3-9-53 | Issued bench warrant with copy of indictment. mk. | |
| 3-16-53 | Filed appearance. bond $5,000.00 | |
| 3-18-53 | Ent order continue arraignment from March 24, 1953 to April 15, 1953 - Sullivan, J. | |
| 3-19-53 | Mld ntc | |
| " " " | Filed warrant ret'd exctd $2.00 | |
| 4-13-53 | On defts. motion cs. cont'd. to May 4, 1953 for arraignment and plea-Igoe, J. | |
| | Mld. notice to attys. 4-14-53. | P |
| 5-4-53 | On defts. motion cs.cont'd. to May 13, 1953 for arr and plea-Igoe, J. | |
| | Mld. notice to attys.5-5-53. | P |
| 5-13-53 | Defendant with counsel enters a plea of not guilty and is given 20 days herefrom to file any preliminary motions. U.S.Attorney given 20 days thereafter to answer said motions and hearing on said motions, if any, is set for June 19, 1953 2 P.M.-Igoe,J | |
| 5-13-53 | Mld ntcs | |
| MAY 22 1953 | Cause Reassigned to Calendar of Judge KNOCH | |
| 5-28-53 | By agreement order time for deft to file preliminary motions extended to July 1, 1953 and hearings on said motions reset to September 25, 1953 - Knoch, J. | |
| 5-29-53 | Mld ntc | |
| 6-10-53 | Filed motion to dismiss and alternative motions, affidavit in support thereof, brief in support thereof (10) and copy of same | |
| 7-1-53 | On Govt's motion enter order to extend time for Government to file its brief in opposition to defendant's motion to dismiss indictment up to and including 8/15/53 - Knoch, J. | |
| 7-2-53 | Mld ntc | |
| 7-28-53 | Filed Notice. (1) | |
| " " " | Leave deft. to file instanter supplemental affidavit in support of motion to dismiss indictment, Order time for Govt. to ans. defts. motion to dismiss extended to August 24, 1953-Barnes, J. | |
| | Mld. notice to attys. 7-29-53. | |
| 7-28-53 | Filed Supplemental Affidavit of Joseph A. Strnett in support of motion to dismiss (12) | P |
| 8-10-53 | Filed Subpoena Duces Tecum ret'd, served on Ernest C. Wright .70 | P |
| 9-2-53 | Ent motion [illegible] for inspection (2) | |

C

| DATE | PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT |
|---|---|---|---|
| 6-1-55 | Filed memorandum of Judge Knoch (1) | | |
| 6-3-55 | Mailed copies to atty & U.S.Atty | s | |
| 6-6-55 | Filed memorandum for plaintiff in opp to deft's mo for judgt of acquittal etc (14) | s | |
| 6-16-55 | On finding of guilty deft committed 2 years on each of counts 1,2 & 3 with sentences in cts 2 & 3 to run concurrently with that imposed in ct 1 & deft fined $2,000.00 on each cts 1,2 & 3-fines to be cumulative. On mo deft order deft released on bond of $7,500 pending appeal & bond on appeal fixed in sum of $7,500 - Knoch, J. | JS3 | |
| 6-16-55 | Filed appearance bond $7,500.00 | | |
| 6-21-55 | Mailed notices | | |
| 6-[illegible]-55 | Issued commitment & copy to U.S.Marshal | s | |
| 6-[illegible]-55 | Filed Notice of Appeal by Defendant (2) | | 5 00 pd |
| 6-24-55 | Mailed copy of Notice of Appeal to U. S. Atty., U. S. Marshal and copy with Statement of Docket Entries to U. S. C. A. | P | |
| 6-24-55 | Filed stipulation | | |
| 6-24-55 | By stip time in which d t is to file his designation of record on appeal be & is extended to & including July 19,1955-Hoffman,J. | | |
| 6-27-55 | Mailed notices | s | |
| [illegible]-19-55 | Filed Statement of Points (2) | | |
| [illegible]-19-55 | Filed Designation of Record (3) | P | |
| 7-28-55 | Filed Notice and Motion (1)(1) | | |
| " | Order time for docketing and filing the record on appeal extd to Sept. 22, 1955 - LaBuy, J. - DRAFT/ | | |
| | Mld ntcs 7-29-55 | H | |
| [illegible]-[illegible]-55 | Filed Subpoena retd unexecuted (H.Jahnke) | | |
| " | Filed Subpoena retd served (E. Munts) 5.50 | | |
| " | Filed Two Subpoenas Duces Tecum retd unexecuted - | | |


| | | | |
|---|---|---|---|
| [illegible]-19-55 | Filed Designation of Record (3) | P | |
| 7-28-55 | Filed Notice and Motion (1)(1) | | |
| " | Order time for docketing and filing the record on appeal extd to Sept. 22, 1955 - LaBuy, J. - DRAFT/ | | |
| | Mld ntcs 7-29-55 | H | |
| [illegible]-[illegible]-55 | Filed Subpoena retd unexecuted (H.Jahnke) | | |
| " | Filed Subpoena retd served (E. Munts) 5.50 | | |
| " | Filed Two Subpoenas Duces Tecum retd unexecuted - | | |
| " | Filed 35 Subpoenas Duces Tecum retd executed (no charge) - | | |
| " | Filed 23 Subpoenas Duces Tecum retd executed 77.30 | H | |
| [illegible]-[illegible]-55 | Filed Notice (1) | | |
| " | Filed Motion of defendant (1) | | |
| | Enter order excusing Clerk on Completion of Transcript of record and to certify original exhibits on appeal in lieu of copies - DRAFT - Knoch, J. (1) | | |
| | Mailed Notice to ATtys. 9-22-55 | | |
| [illegible]-[illegible]-55 | Filed Government's Exhibits 1 to 27 incl.; 29 to 32 incl.; 32a;33 to 56 incl.; 58, 60, 60a, 62 to 79 incl.; 80a, 81 to 90 incl.; 92, 102, 104 to 108 incl.; 110 to 123 incl.; 123a,b & c; 124, 124a,b & c; 125, 125a & b; 126; 126a,b & c; 127, 127a,b & c; 128; 129, 129a, b,c & d; 130, 130a & b; 131; 131a, b & c; 132; 132a,b & c; 133, 133a, b & c; 134; 134 a& b; 135; 135a,b & c& d; 136,136a, b & c; 137, 137a, b & c; 138; 138a,b & c; 139a, 140, 140a, b & c; 141; 141a,b & c; to 144, 144a,b & c; incl.; 145, 145 a & b; 146, 146a, b & c; to 149, 149, a, b & c; 150; 150a & b; 151; 151a,b & c; 152; 153; 153a & b; 154, 154 a & b; 155; 155a, b & c; 156; 156a, 157a, 158a, 159; 159a & b; 160; 160a, b c, d & e; 161, 161a, 162, 164, 165, 166, 167, 167a, 168 to 175, 177 to 182 incl.;183, 183a,b & c; 184; 184a and b; 184, 185a, b & c; 185; 186, 186b, c & d; 187, 187a, b, & c & d, 188; 188a, b & c; 189 to 196, incl.; ;96F. 197to 202, incl., 203, 203a & b, 204to 216, 220 to 232 incl.; 233b, 234 to 266, 269, 270a, 271, 272, 273, 273a, 274, 275, 278, 279, and 280. | | |
| [illegible]-[illegible]-55 | Filed Defendant's exhibits 4, 5, 6, 7, 8, 9, 10, 12, 13 and 17 | | |
| [illegible]-[illegible]-55 | Clerk's file copy of transcript of proceedings had on Nov. 8, 9,15, 16, 17, 18 and 22, 1954; before Judge Knoch, filed by official court reporter - two volumes | | |


C

D

| DATE | PROCEEDINGS | CLERK'S FEES PLAINTIFF | CLERK'S FEES DEFENDANT |
|---|---|---|---|
| 9-22-55 | Clerk's file copy of transcript of proceedings had before Judge Knoch, on April 11, 12, 13, 14, 18, 19, 20, 21, 25, 26, 27, 28, and May 2, 3, 4, 5, 9 and 10 and 11, 1955 filed by Official court reporter (six (6) Volumes) (2569) | | |
| | Clerk's File copy of Transcript of proceedings had on May 27, 1955 and June 16, 1955 before Judge Knoch, filed by official court reporter (59 & 6) | | |
| 9-22-55 | Transmitted Transcript of record on appeal to USCA together with original exhibits filed 9-20-55 B | | 48 45 |
| 11-26-56 | Filed Opinion of U.S.C.A. | | |
| | Filed Mandate of U.S.C.A., Judg. of D.C. is REVERSED as to Count I and AFFIRMED as to Counts II and III H | | |
| 11-26-56 | Filed Notice, Motion and Petition (1)(1) | | |
| " | On deft's motion order stay of mittimus until 12 noon, Dec.27,1956, and order deft's motion to correct or reduce sentence entd and taken under advsmt on brfs; supptg brf to be filed by Nov.28,1956; answering brf by Dec.10,1956 and reply within 5 days thereafter. Order leave to Anna R. Lavin to file appearance as addtl counsel for deft - Knoch,J. | | |
| | Mld ntcs 11-26-56 | | |
| 11-26-56 | Filed appearance of atty for deft. H | | |
| 11-28-56 | Filed deft's memo in suppsrt of mo to vacate or reduce sent. jk | | |
| 12-7-56 | Filed Memo in opp. to deft's mo to vacate jk | | |
| 12-14-56 | Filed Reply in support of motion pursuant to Rule 35 H | | |
| 12-20-56 | Filed Notice and Motion | | |
| | Order deft's motion to conform judgment & commitment to Mandate entd & contd for entry of order until dispsn of motion now under advsmt - Knoch, J. | | |
| | Mld ntcs 12-20-56 | | |


| | | | |
|---|---|---|---|
| 11-28-56 | Filed deft's memo in suppsrt of mo to vacate or reduce sent. jk | | |
| 12-7-56 | Filed Memo in opp. to deft's mo to vacate jk | | |
| 12-14-56 | Filed Reply in support of motion pursuant to Rule 35 H | | |
| 12-20-56 | Filed Notice and Motion | | |
| | Order deft's motion to conform judgment & commitment to Mandate entd & contd for entry of order until dispsn of motion now under advsmt - Knoch, J. | | |
| | Mld ntcs 12-20-56 H | | |


| | | | |
|---|---|---|---|
| 12-27-56 | Enter order amending judg and comm. of June 16,1955 to conform to Mandate of U.S.C.A: for the 7th Circuit - DRAFT - Knoch, J. | | |
| | Mld ntcs 12-28-56 | | |
| 12-27-56 | Enter order denying deft's motion heretofore made to correct sentence and granting deft's motion to reduce sentence on Counts 2 and 3 to 1 year on each of said counts and imposing a fine of $1,000.00 on each of said counts with sentence in Count 3 to run concurrently with Count 2 and fines to be cumulative. On deft's motion order stay of execution extended to Jan.28,1957 at 12:00 noon with present bond to stand - DRAFT - Knoch, J. Supp. J.S-8. ntc. | | |
| | Mld ntcs 12-28-56 | | |
| 12-28-56 | Issued 2 c.c. each of above two orders to U. S. Marshal H | | |
| 1-8-57 | Filed Memorandum of Judge Knoch | | |
| | (Mld copies to U.S.Atty and attys.) H | | |
| 1-8-57 | Filed Notice of Appeal of Defendant (2) | | 5 .0 |
| | Mailed copy of Notice of Appeal to U.S.Atty., and U.S.Marshal, copy with statement of docket entries to U.S.C.A. 7th Circuit B | | |
| 1-9-57 | On defendant's motion order bond on appeal fixed in sum of $7500.00 and leave granted to file amended notice of appeal - Knoch, J. | | |
| | Mailed notice to attorneys 1-9-57 | | |
| 1-9-57 | Filed Amended Notice of Appeal (2) | | |
| | Mailed copy of Amended notice of appeal to U.S.Atty., U.S.Marshal and U.S.C.A. 7th Circuit B | | |
| 1-10-57 | Filed Appeal Bond - $7,500.00 (Marshal notified ) H | | |
| 2-6-57 | Clerk's file copy of transcript of proceedings had on Dec. 27,1956 before Judge Knoch filed by official court reporter (11)B | | |
| 2-[illegible] | Filed Appearance of atty for deft. H | | |

D

[fol. E] UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and partial copy of the original docket entries in the cause entitled:

United States of America vs. Sam Achilli No. 53 CR 154;

now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois this 8th day of February, A. D. 1957.

Roy H. Johnson, Clerk, by Gizella Butcher, Deputy Clerk.

[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

No. 53-CR-154

UNITED STATES OF AMERICA, Plaintiff,

v.

SAM ACHILLI, Defendant

PREFIX TO RECORD PURSUANT TO RULE 12(c)—February 6, 1957

Style of Court: District Court of the United States for the Northern District of Illinois, Eastern Division.

Title of Case: United States of America v. Sam Achilli, No. 53-CR-154.

Commencement of Action: Indictment filed March 9, 1953.

Parties: United States of America, Plaintiff; Sam Achilli, Defendant, 732 Brook Street, Elgin, Illinois.

Pleadings Filed: Indictment March 9, 1953, charging the filing of false and fraudulent income tax returns, with intention to evade the tax for the calendar years 1946, 1947 and 1948. Not Guilty plea, May 13, 1953.

Defendant Status: Bail taken for trial in District Court. Bail taken for this Appeal.

Trials: First trial: November 8 to 22, 1954, resulting in declaration of mistrial by Court: Second trial: April 11 to May 27, 1955, resulting in conviction on all three counts of Indictment.

Judge: Hon. Win G. Knoch.

Verdict: Trial by Jury. Verdict of guilty by Jury on all three counts of Indictment.

Final Decree: Judgment and sentence of the Court was on June 16, 1955.

Sentence: Two years on each count, sentences to run concurrently; and fine of two thousand dollars ($2,000) on each count.

Date of Appeal: June 24, 1955.

[fol. 2] Opinion of United States Court of Appeals, Seventh Circuit, filed June 5, 1956, reversed the judgment of conviction on the first count, and affirmed the judgment of conviction on the second and third counts (234 F. 2d 797). The Supreme Court on November 19, 1956, denied certiorari, and the matter came on before The Honorable Win G. Knoch, District Judge, for sentencing under the mandate of the Court of Appeals.

The mandate of the Court of Appeals, Seventh Circuit, filed November 26, 1956.

Pleadings Subsequent to Filing of Mandate:

November 26, 1956. Motion and Petition filed to correct or reduce sentence.

December 19, 1956. Motion to conform judgment and commitment to mandate.

December 27, 1956. Order amending judgment and commitment to conform to mandate.

December 27, 1956. Order denying motion to correct sentence and granting motion to reduce sentence.

January 2, 1957. Memorandum Opinion of The Honorable Win G. Knoch, District Judge, filed.

January 4, 1957. Notice of appeal filed.

January 7, 1057. Amended notice of appeal filed.

January 17, 1957. Bail taken for this Appeal.

Date of this Appeal; January 7, 1957.

Peter B. Atwood, Attorney for Defendant.

Dated, February 6, 1957.

[fol. 3] Placita (omitted in printing).

[fol. 4] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 53-CR-154

(Sec. 145(b), Internal Revenue Code; Title 26, United States Code.

UNITED STATES OF AMERICA

vs.

SAM ACHILLI

INDICTMENT—Filed March 9, 1953

The March 1953 Grand Jury charges:

That on or about the 10th day of March, 1947, in the Northern District of Illinois, Eastern Division, the defendant, Sam Achilli, late of Elgin, Illinois, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $11,753.96 and that the amount of tax due and owing thereon was the sum of $2,780.15; whereas, as he then and there well knew, his net income for the said calendar year was the sum of $44,254.60, upon which said net income he owed to the United States of America as income tax of $20,856.74.

In violation of Section 145(b), Internal Revenue Code; Title 26, United States Code.

[fol. 5] Count Two

The March 1953 Grand Jury further charges:

That on or about the 15th day of March, 1948, in the Northern District of Illinois, Eastern Division, the defendant, Sam Achilli, late of Elgin, Illinois, did wilfully and knowingly attempt to defeat and evade a large part of the

income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $16,785.52 and that the amount of tax due and owing thereon was the sum of $4,620.98; whereas, as he then and there well knew, his net income for the said calendar year was the sum of $70,785.75, upon which said net income he owed to the United States of America an income tax of $39,484.76.

In violation of Section 145(b), Internal Revenue Code; Title 26 United States Code.

[fol. 6] Count Three

The March 1953 Grand Jury further charges:

That on or about the 15th day of March, 1949, in the Northern District of Illinois, Eastern Division, the defendant, Sam Achilli, late of Elgin, Illinois, who during the calendar year 1948 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, Illinois, a false and fraudulent joint income tax-return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of $34,053.12 and that the amount of tax due and owing thereon was the sum of $8,968.52; whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $52,805.05, upon which said net income there was owing to the United States of America an income tax of $17,997.25.

In violation of Section 145(b), Internal Revenue Code; Title 26, United States Code.

A true bill.

[Illegible] Foreman.

[Illegible], United States Attorney.

[fol. 7] [File endorsement omitted.]

[fol. 8] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, ss:

The President of the United States of America

To the Honorable the Judges of the United States District Court for the Northern District of Illinois, Eastern Division, November 23, 1956.

MANDATE

Greeting:

Whereas, lately in the United States District Court for the Northern District of Illinois Eastern Division before you, or some of you, in a cause between the United States of America, Plaintiff and Sam Achilli, Defendant, No. 53-Cr-154, a judgment was entered on the sixteenth day of June, 1955.

[fol. 9] as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Seventh Circuit by virtue of an appeal by Sam Achilli, agreeably to the act of Congress, in such case made and provided fully and at large appears.

[fol. 10] And whereas, in the term of October, in the year of our Lord one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed as to Count I and affirmed as to Counts II and III of the Indictment.

Tuesday, June 5, 1956

And afterwards, to-wit, on the twentieth day of June, 1956, there was filed in the Office of the Clerk of this Court a Petition for Rehearing, which said Petition for Rehearing was denied on the thirty-first day of July, 1956.

[fol. 11] You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought

to be had, the said Judgment notwithstanding. Witness, the Honorable Earl Warren, Chief Justice of the United States, the twenty-third day of November, in the year of our Lord one thousand nine hundred and fifty-six.

Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit.

[File endorsement omitted]

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[fol. 12] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

MOTION TO CORRECT OR REDUCE SENTENCE AND PETITION FOR STAY OF MITTIMUS—Filed November 26, 1956

Now comes the defendant, Sam Achilli, by his attorneys, Frank J. Gagen, Jr., and Anna R. Lavin, and moves the court, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, to vacate, set aside, correct or reduce the sentence heretofore imposed herein, on the following grounds:

1. The pertinent counts of the indictment herein whereupon the judgment of guilty was imposed are duplicitious
2. The sentence and fine are in excess of that authorized by law.
3. The equitable considerations occurring subsequent to sentence, and therefore, without the knowledge of the Court.

The defendant further prays the court to stay the mittimus hereon pending the determination of the foregoing motion, or until such time as this Court may deem meet.

Frank J. Gagen, Jr., 29 South LaSalle Street, Chicago 3, Illinois, Anna R. Lavin, One North LaSalle Street, Chicago 2, Illinois.

[fol. 13] [File endorsement omitted]

[fol. 14] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 53-CR-154

UNITED STATES OF AMERICA,

vs.

SAM ACHILLI, Defendant

TRANSCRIPT OF PROCEEDINGS—Filed February 6, 1957

had in the above-entitled cause before the Honorable WIN G. KNOCH, one of the Judges of said Court, in his Court Room in the United States Court House, Chicago, Illinois, on Thursday, December 27, 1956, at 10:30 o'clock a. m.

PRESENT:

Hon. Robert Tieken, United States Attorney, Northern District of Illinois, Eastern Division, by

Mr. Edward J. Calihan, Jr., Assistant United States Attorney, appeared for the United States of America;

Mr. Frank J. Gagen, Jr., and Miss Anna R. Lavin, appeared for the Defendant.

[fol. 15] The Clerk: 53-CR-154, United States of America, against Sam Achilli, Motion of Defendant for further stay of mittimus until disposition of motion now under advisement.

Mr. Gagen: Good morning, your Honor. We are presenting this motion to your Honor this morning, recalling to you that the stay heretofore granted expires at noon today. The stay, of course, was granted pending motion under Rule 35 for reduction of sentence.

By this motion I do not by any means mean to hurry the Court in its decision at all, but I would just like to point out the timeliness of it to you.

I also would like to urge upon your Honor further certain considerations that I feel very strongly about, and those pertain to the situation facing the Defendant at this time relative to the sickness of his wife.

I do not imagine, because of the lengthy briefs that the Defendant and the Government have filed with respect to this motion, that your Honor has had an opportunity fully to consider another investigation to advise you of the cir-
[fol. 16] cumstances of this family group. It is quite an impelling thing, and although I do not understand the full significance of it myself, there seems to be quite a degree of permanent injury seriously affecting this woman's ability to care for three little boys, thirteen, nine and four, I believe their ages are.

I know your Honor by reputation would be greatly concerned with seeing the best interests of justice served, and possibly you would further consider it. I do not know what decision you may have reached on it; I just further urge it upon you.

I, of course, have made a great mistake in this case in that I do not think any attorney is wise to allow himself to become emotionally involved with his client, but I feel very strongly for Mr. Achilli apart from being an advocate. I have tried to brush a little of that off on Miss Lavin, and I have had her advice in this case and I am sure you will recognize it in the care with which we have approached the matter now before the Court.

[fol. 17] Of course, your Honor will recall that I sat here as local counsel during the trial of this case. I came in on the case on the day it started to trial. I feel that Mr. Achilli has been the subject of advice that possible has prejudiced him in many instances, but I think that the facts and circumstances that now face him are such that the Court should be well advised. I would just urge in considering further disposition of the stay of mittimus that you give us additional time, if you need additional time to reach a ruling on the matter that has been presented to you.

The Court: Well, I have taken the time in the last two days to go into this matter very thoroughly. I have examined the briefs submitted, the law involved and have given consideration to every conceivable angle in this case.

It is hardly necessary to say that the Court has devoted a lot of time to this case over the last two years. The Defendant has had the benefit of a review both by the Circuit Court of Appeals and the United States Supreme Court.

[fol. 18] Now, with respect to the first count, the Court was reversed, and the Court was affirmed on the last two counts of the indictment. Have you examined this Order, counsel, that has been submitted?

Mr. Calihan: Yes.

The Court: Is that agreeable with the Government?

Mr. Calihan: Yes.

The Court: I am going to enter this Order.

Mr. Gagen: I assume you are referring to the conformance of the judgment commitment to the mandate of the Court.

The Court: That is right.

Mr. Gagen: Thank you, your Honor.

The Court: Now, we have two motions here. One is a motion to correct and the other is a motion to reduce the sentence. After giving this matter very thorough attention I am of the opinion that the motion to correct should be denied.

With respect to the motion for reduction of sentence, I have given much consideration to that particular matter in [fol.19] view of all the circumstances and everything that has transpired here. Now, the point raised by the defense is that the Defendant was actually involved in a misdemeanor under both the second and third counts of the indictment, rather than a felony.

That matter has never been finally adjudicated by our Supreme Court. I can conceive that there is quite a diversity of opinion on that question. I am, therefore, taking that into consideration in my final judgment in this case.

Another matter, of course, is that the first count which involved a sizable amount of non-payment of tax has been eliminated from this case; and I am taking that into consideration.

It is the judgment of the Court, and I will file a memorandum to convey more completely my ideas in this matter, that the sentence should be reduced to one year and that there should be a $1,000 fine under each one of the two counts, the second and third counts of the indictment; [fol. 20] and the sentences are to run concurrently and not consecutively. That is the judgment of the Court.

I feel that I have taken into consideration every conceivable aspect of this matter, and it is my present conviction

that this determination, even after the long road that we have traveled, has given the Defendant the benefit of every doubt. I also feel that a sentence of this kind will ultimately do as much good as the former sentence under the felony counts would have done. With all that in mind, I think this is a sound and proper disposition of the case, and that the ends of justice have been met. That is it, ladies and gentlemen.

Mr. Gagen: Thank you, your Honor.

The Court: It is the judgment of the Court that the Defendant be taken from the bar of this Court—

Mr. Gagen: Your Honor, may I just urge upon you—may I interrupt you, please?

The Court: What have you now?

[fol. 21] Mr. Gagen: I am asking for a stay on this, your Honor. You see, we have never had a terminal date with reference to this man's ability to prepare himself for incarceration. I would just ask for a stay of 30 days, at the end of which he will submit himself to the Attorney General for imprisonment. As you know, he has this active automobile business, and his situation at home, and he has to make other arrangements. In view of those circumstances, would you please consider a 30-day stay for those purposes?

Mr. Callihan: Before getting to that, is it my understanding that the net result is that there be a one-year sentence and a $2,000 fine, $1,000 on each of the two counts?

The Court: Yes.

Mr. Gagen: The fines cumulative.

The Court: Yes.

Mr. Callihan: As far as the stay is concerned, your Honor, I am only down here to represent the Government in place of Mr. Russo. I am not too familiar with the facts.

I do know, however, that he does have a going business [fol. 22] and that he does have responsibilities at home. Therefore it would be our position that it would be a matter entirely within the sound discretion of the Court.

The Court: Well, with the understanding that this matter is finally concluded and that there will be no further motions of any kind or character——

Mr. Gagen: Yes, your Honor.

The Court: (continuing)—it will be the judgment of the Court that the Defendant be taken from the bar of this Court and placed in the hands of the Attorney General of the United States under the second count of the indictment for a period of one year, together with a fine of $1,000, unless sooner released by due process of law; and that under the third count of the indictment, the Defendant be placed in the hands of the Attorney-General for disposition to a proper penal institution for a period of one year, with a fine of $1,000, unless sooner released by due process of law, the sentence on Count 3 to run concurrently with that on Count 2, the fines to be cumulative, or a total of $2,000.

[fol. 23] Execution will be stayed to January 28th at the hour of twelve o'clock noon. He is to report at the Marshal's office at that time. Now there is a question of a bond.

Mr. Gagen: I have the surety present. He has no objection to a further continuance on this bond.

The Court: Let's make that a matter of record, then.

Mr. Gagen: Will you step forward, please.

The Court: Are you agreeable to continuing on the bond to the date indicated and the hour indicated by the Court?

Mr. Markheim: Yes.

The Court: All right. That will be all.

Mr. Gagen: Thank you very much, your Honor.

Miss Lavin: Thank you.

(Which were all of the proceedings had in the above-entitled cause on the day and date aforesaid.)

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[fol. 24] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

MOTION TO CORRECT THE JUDGMENT AND COMMITMENT ETC.—
Filed December 19, 1956

Now comes Sam Achilli, defendant, by and through his attorneys, Frank J. Gagen, Jr. and Anna R. Lavin, and moves the Court as follows:

1. On June 16, 1955, upon a verdict of guilty on all three counts of the indictment herein, this Court entered its judgment on said verdict and committed the defendant, Sam Achilli, ". . . to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years on each of Counts 1, 2 and 3 of the Indictment, that the sentences imposed on counts 2 and 3 shall run concurrently with the sentence imposed on count 1 and besides that he forfeit and pay to the United States of America a fine in the sum of Two Thousand Dollars ($2,000.00) on each of counts 1, 2 and 3 of the Indictment, that said fines shall be cumulative and the defendant to stand committed until said fines are paid or until he shall be otherwise discharged by due course of law. . . ."

2. That on November 26, 1956 the mandate of the United States Court of Appeals for the Seventh Circuit was filed herein, in substance, as follows:

[fol. 26] ". . . the judgment of said District Court in the cause appealed from be, and the same is hereby, Reversed as to Count I and affirmed as to Counts II and III of the Indictments. . . ."

Wherefore, defendant moves to correct the judgment and commitment heretofore entered herein to conform to the mandate of the United States Court of Appeals for the Seventh Circuit and prays that such a further order be entered in such form as this Court directs.

Frank J. Gagen, Jr., Anna R. Lavin, Attorneys for Defendant.

[fol. 26a] [File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 53-CR-154

UNITED STATES OF AMERICA, PLAINTIFF

vs.

SAM ACHILLI, Defendant

ORDER AMENDING JUDGMENT AND COMMITMENT TO CONFORM TO MANDATE—December 27, 1956

This cause coming on to be heard on notice and on the motion of Sam Achilli, defendant, through his respective counsel, for an order to conform the prior judgment and commitment of this Court on June 16, 1955 to the mandate of the United States Court of Appeals for the Seventh Circuit as filed herein on November 26, 1956.

And the Court being fully advised in the premises,

It is hereby ordered, that the judgment and commitment of this Court entered herein on the 16th day of June, 1955 be and the same is hereby amended to conform to the mandate of the United States Court of Appeals for the Seventh Circuit to read in part as follows:

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years on each of Counts 2 and 3 of the Indictment, that the sentence imposed on Count 3 shall run concurrently with the sentence imposed on Count 2 and besides that he shall forfeit and pay to the United States of America a fine [fol. 28] in the sum of Two Thousand Dollars ($2,000.00) on each of Counts 2 and 3 of the indictment, that said fines shall be cumulative and the defendant to stand committed until said fines are paid or until he shall be otherwise discharged by due course of law.

It is ordered that the Clerk deliver a certified copy of the judgment and commitment to the United States Marshal

or other qualified officer and that the copy serve as the commitment of the defendant.

Entered this 27th day of December, 1956.

Win G. Knoch, United States District Judge.

[fol. 28a] [File endorsement omitted.]

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[fol. 29] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ORDER DENYING MOTION TO CORRECT AND GRANTING MOTION TO REDUCE SENTENCE—December 27, 1956

This cause this day coming on for hearing on the defendant's motions heretofore entered herein to correct or reduce sentence comes the United States by the United States Attorney comes also the defendant Sam Achilli in his own proper person and by his counsel and the Court being fully advised in the premises it is

Ordered that the defendant's motion to correct sentence be and the same is hereby denied and it is

Further ordered that the sentence heretofore imposed on Counts 2 and 3 of the Indictment be and the same is hereby reduced to a period of One (1) Year on each of said counts and that the fine heretofore imposed on each of Counts 2 and 3 be and the same is hereby reduced to the sum of One Thousand Dollars ($1,000.00), that the sentence imposed on Count 3 shall run concurrently with the sentence imposed on Count 2 and that the fines shall be cumulative and on the defendant's motion it is

Further Ordered that the stay of execution be and the same is hereby extended to January 28, 1957 at 12:00 o'clock Noon and that the defendant's present bond shall remain in full force and effect.

December 27, 1956.

Win G. Knoch, United States District Judge.

[fol. 30] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 53-CR-154

UNITED STATES OF AMERICA

vs.

SAM ACHILLI

MEMORANDUM—January 2, 1957

This matter came on to be heard on motion to correct and on motion to reduce the sentence heretofore imposed herein.

The Court has had the benefit of argument of counsel on briefs, has studied the authorities to which the Court's attention has been invited, has reviewed the entire record in this matter and is fully advised in the premises.

The Court has weighed the arguments advanced in support of the motion to correct which is based on the theory that the indictment in effect charges not felonies but misdemeanors only. The point has never been finally adjudicated by the United States Supreme Court and there would appear to be a diversity of opinion concerning it.

It is the considered opinion of this Court that there is insufficient basis here to warrant granting a motion to correct, and motion to correct has accordingly been denied.

With respect to the motion for reduction of sentence, the Court has given very thorough attention to every conceivable aspect of this matter, among others, the fact that there has been a reversal by the Court of Appeals for the Seventh Circuit with respect to the First Count which involved nonpayment of a sizable tax sum, now eliminated from this case; and giving the defendant the benefit of every doubt, this Court's own belief that a sentence of the kind now imposed will ultimately serve the same good purpose as the former sentence herein.

Therefore, a sentence has been imposed for a period of one year under the Second Count of the indictment together with a fine of $1000, and one year under the Third Count of the indictment together with a fine of $1000, unless sooner

released by due process of law, the sentence under the Third [fol. 31] Count to run concurrently with that under the Second Count, and the fines to be cumulative, or in the total sum of $2,000.

It is hardly necessary to say that the Court has devoted a great deal of time and thought to this case over the last two years, and, with studied reflection on the long road we have traveled, it is my present conviction that this determination represents a sound and proper disposition of the case, and that the ends of justice have been met.

Win G. Knoch, United States District Judge.

Date: Jan. 2, 1957.

[fol. 31a] [File endorsement omitted.]

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[fol. 32] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

NOTICE OF APPEAL—Filed January 4, 1957

Name and address of appellant: Sam Achilli, 65 River Bluff Road, Elgin, Illinois.

Names and address of appellant's attorneys: Frank J. Gagen, Jr., #845, 29 S. LaSalle St., Chicago 3, Illinois. Anna R. Lavin, One North LaSalle St., Chicago 2, Illinois.

General Statement of Offense: Wilfully and knowingly attempting to defeat income taxes by filing with the Collector of Internal Revenue false income tax returns for the years 1947 and 1948.

Concise Statement of Judgment and Order, Dates and Sentences: Judgment was entered on June 16, 1955 by Win G. Knoch Judge, United States District Court for the Northern District of Illinois, on a jury verdict of guilt on three Counts of the Indictment.

The defendant was sentenced to two years concurrently

on all three counts and fined $2,000.00 on each count, cumulatively. On June 5, 1956, the United States Court of Appeals for the Seventh Circuit on the convictions and sentences reversed count I and affirmed counts II and III. [fol. 33] On November 26, 1956, on the date the Mandate of the United States Court of Appeals for the Seventh Circuit was filed, the defendant moved to vacate, correct or reduce the sentences and fines of June 16, 1955. On December 27, 1956 the Honorable Win G. Knoch, Judge, United States District Court for the Northern District of Illinois denied said motion in part.

The defendant is at liberty on $7,500.00 bond, pending appeal.

I, Sam Achilli, the appellant, by my attorneys, Frank J. Gagen, Jr., and Anna R. Lavin, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the order of December 27, 1956, denying the motion to vacate or correct the sentences and fines heretofore imposed on me.

Dated: This 4th day of January, 1957.

Sam Achilli, by Frank J. Gagen, Jr., Anna R. Lavin.

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[fol. 34] Certificate of Mailing (omitted in printing).

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[fol. 35] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Present: Honorable Win G. Knoch, District Judge.

[Title omitted]

ORDER FIXING APPEAL BOND—January 7, 1957

On motion of defendant by his counsel it is

Ordered that bond on appeal be and the same hereby is fixed in the sum of $7,500.00 and that leave be and hereby is granted to file an amended notice of appeal.

[fol. 36] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

AMENDED NOTICE OF APPEAL—Filed January 7, 1957

Name and Address of Appellant: Sam Achilli, 65 River Bluff Road, Elgin, Illinois.

Name and Address of Appellant's Attorneys: Frank J. Gagen, Jr., 29 South La Salle St., Chicago 3, Illinois, Anna R. Lavin, One North La Salle St., Chicago 2, Illinois.

General Statement of Offense: Wilfully and knowingly attempting to defeat income taxes by filing with the Collector of Internal Revenue false income tax returns for the years 1947 and 1948.

Concise Statement of Judgment and Order, Dates and Sentences: Judgment was entered on June 16, 1955 by Win G. Knoch, Judge, United States District Court for the Northern District of Illinois, on a jury verdict of guilt on three Counts of the Indictment.

The defendant was sentenced to two years concurrently on all three counts and fined $2,000.00 on each count, cumulatively. On June 5, 1956, the United States Court of Appeals for the Seventh Circuit on the convictions and sentences reversed count I and affirmed counts II and III.
[fol. 37] On November 26, 1956, on the date the Mandate of the United States Court of Appeals for the Seventh Circuit was filed, the defendant moved to vacate, correct or reduce the sentences and fines of June 16, 1955. On December 27, 1956 the Honorable Win G. Knoch, Judge, United States District Court for the Northern District of Illinois, granted the motion to reduce the sentence, setting same at one year, concurrent, and $1,000.00, cumulative, but denied the motion to correct sentence; later, on January 2, 1957, the Court filed a memorandum decision to the orders of December 27, 1956 wherein said decision denied the motion to correct and an integral part of the motion to reduce previously acted upon favorably.

The defendant is at liberty on $7,500.00 bond, pending appeal.

I, Sam Achilli, the appellant, by my attorneys, Frank J. Gagen Jr., and Anna R. Lavin, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the orders of December 27, 1956, and January 2, 1957, denying the motion to vacate, correct or reduce the character of the sentences and fines imposed on me.

Dated: This 7th day of January, 1957.

Sam Achilli, By: Frank J. Gagen, Jr., Anna R. Lavin.

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[fol. 38] Certificate of Mailing (omitted in printing).

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[fol. 39] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted]

STIPULATION OF RECORD ON APPEAL—Filed February 7, 1957

It is hereby stipulated and agreed by and between the undersigned counsel for the respective parties to the above entitled cause, that the record to be filed in the United States Court of Appeals for the Seventh Circuit, pursuant to the appeal taken in the above entitled cause, include therein the following:

1. Indictment filed March 9, 1953.
2. Mandate of United States Court of Appeals, Seventh Circuit, dated November 26, 1956.
3. Motion to Correct or Reduce Sentence and Petition for Stay of Mittimus, filed November 26, 1956.
4. Transcript of proceedings before The Honorable Win G. Knoch, Judge, had on December 27, 1956, with respect to the hearing on said Motion to Correct or Reduce Sentence.

5. Motion to Conform Judgment and Commitment to Mandate, filed December 19, 1956.

6. Order entered December 27, 1956, amending judgment and commitment to conform to mandate.

[fol. 40] 7. Order entered December 27, 1956, denying Motion to Correct and granting Motion to Reduce Sentence.

8. Memorandum Opinion of The Honorable Win G. Knoch, Judge, filed January 2, 1957, with respect to Order entered December 27, 1956 denying Motion to Correct Sentence and granting Motion to Reduce Sentence.

9. Notice of Appeal filed January 4, 1957.

10. Amended Notice of Appeal filed January 7, 1957.

11. This Stipulation of Designation of Record on Appeal.

Dated, this 6th day of February, 1957.

The United States of America, By R. Tieken, United States Attorney, Attorney for Plaintiff, Sam Achilli, By Peter B. Atwood, Attorney for Defendant.

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[fol. 41] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted]

STATEMENT PURSUANT TO RULE 12(D) OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT—Filed February 8, 1957

R. Tieken, United States Attorney, makes the following statement pursuant to Rule 12(d) of the United States Court of Appeals:

1. The name of the appellee is the United States of America.

2. Counsel for the appellee are as follows:

R. Tieken,
United States Attorney,
450 United States Court House,

Chicago 4, Illinois;
John P. Lulinski,
Assistant United States Attorney,
450 United States Court House,
Chicago 4, Illinois;
Edward A. Strugala,
Assistant United States Attorney,
450 United States Court House,
Chicago 4, Illinois.

R. Tieken, United States Attorney.

JPL:meh.

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[fol. 42] In United States District Court

United States of America,
Northern District of Illinois, ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled: United States of America, vs. Sam Achilli, No. 53 CR 154, as follows:

Indictment filed March 9, 1953.

Mandate of the United States Court of Appeals, for the Seventh Circuit filed November 26, 1956.

Defendant's motion to Correct or Reduce Sentence and Petition for Stay of Mittimus filed November 26, 1956.

Clerk's File copy of Transcript of Proceedings had before the Honorable Win G. Knoch, District Judge on December 27, 1956 and filed February 6, 1957.

Motion of Defendant to correct judgment and commitment filed December 19, 1956.

Order entered December 27, 1956 amending judgment and commitment to conform to mandate.

Order entered December 27, 1956 denying motion to correct and granting motion to reduce sentence.

Memorandum of the Court filed January 2, 1957.

Defendant's Notice of Appeal filed January 4, 1957 (Clerk's Certificate of mailing attached).

[fol. 43] Order entered January 7, 1957, fixing appeal bond in the sum of $7500.00.

Amended Notice of Appeal filed January 7, 1957 (Clerk's Certificate of mailing attached).

Stipulation of Record on appeal filed February 7, 1957.

Statement pursuant to Rule 12(d) of the United States Court of Appeals for the Seventh Circuit, filed February 8, 1957.

filed and entered among the records of the said Court in my office, on the dates indicated.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 8th day of February, 1957.

Roy H. Johnson, Clerk. By Gizella Butcher, Deputy Clerk.

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[fol. 44] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to the Order of this Court entered on the eighth day of March, 1957, I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, herewith certify and transmit to the Supreme Court of the United States the Original Transcript of Record, filed in this Court on the ninth day of February, 1957, in appeal.

No. 11971

THE UNITED STATES OF AMERICA, Plaintiff-Appellee

vs.

SAM ACHILLI, Defendant-Appellant

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighth day of March A. D. 1957.

Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, By: R. Hays Blanchard, Chief Deputy Clerk.

[fol. 45] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

UNITED STATES OF AMERICA, Plaintiff-Appellee

vs.

SAM ACHILLI, Defendant-Appellant

On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable Win G. Knoch, Trial Judge

MOTION TO CONSOLIDATE RECORD—Filed February 13, 1957

Now comes Peter B. Atwood, counsel for Sam Achilli, defendant-appellant in the above entitled cause, and respectfully moves the Court for the entry of an order to consolidate the record heretofore filed in this cause with the printed record in the prior appeal in this cause, Docket No. 11575.

The record as so consolidated will provide the Court with the entire record in this cause, and will permit counsel for the parties hereto to make reference to such parts of the former record as may be necessary during the course of this appeal.

Respectfully submitted, Peter B. Atwood, Counsel for Defendant-Appellant.

Dated, February 12, 1957.

[File endorsement omitted.]

[fol. 46] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

[Title omitted]

MOTION—Filed February 13, 1957

Now comes Peter B. Atwood, counsel for Sam Achilli, defendant-appellant in the above entitled cause, and respectfully moves the Court for the entry of an order granting leave to file the affidavit of Peter B. Atwood, duly sworn to on February 12, 1957, for the purpose of enlarging the grounds heretofore urged before the District Court in the above entitled cause for vacating, setting aside and correcting the sentence entered by the District Court on December 27, 1956, and the memorandum decision entered by the District Court herein on January 2, 1957, which imposed a one year imprisonment under the second and third counts of the indictment, to run concurrently and not consecutively, and a fine totaling $2,000,*000*, upon the grounds that such sentence was imposed in violation of the Constitution and the laws of the United States, and the Court was without jurisdiction to impose such sentence, and that such sentence was in excess of the maximum authorized by law.

Respectfully submitted, Peter B. Atwood, Counsel for Defendant-Appellant.

Dated, February 12, 1957.

[File endorsement omitted.]

[fol. 47] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

SAM ACHILLI, Defendant-Appellant

On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable Win G. Knoch, Trial Judge

AFFIDAVIT

STATE OF ILLINOIS,
County of Cook, ss:

Peter B. Atwood, being duly sworn, deposes and says:

I am the attorney for the above named defendant-appellant, Sam Achilli (hereinafter called "defendant"), and submit this affidavit in support of his motion for an order vacating, setting aside and correcting that part of the sentence entered by the District Court imposing a one year imprisonment and a fine totaling $2,000.00.

After a trial before The Honorable Win G. Knoch, United States District Judge, and a jury, the defendant was found guilty on the first, second and third counts of the indictment charging him with wilfully attempting to evade and defeat federal income taxes for the calendar years 1946, 1947 and 1948 by filing false and fraudulent income tax returns for such years. On June 16, 1955 the defendant was sentenced to two years imprisonment on each count, to run concurrently, and to pay a fine of $2,000.00 on each count, the fines to be cumulative or a total of $6,000.00.

[fol. 48] Subsequently, on June 5, 1956, the United States Court of Appeals for the Seventh Circuit reversed the judgment of conviction on the first count and affirmed the judgment of conviction on the second and third counts (234 F. 2d 797). The effect of such decision was to reduce the alleged

tax deficiency to $43,892.51. The Supreme Court on November 19, 1956 denied certiorari, and the matter came on before The Honorable Win G. Knoch, District Judge, for sentencing under the mandate of the Court of Appeals.

On November 26, 1956, then counsel for the defendant moved the District Court for the entry of an order for leave to file a motion and petition to correct or reduce the sentence and for a stay of mittimus. The grounds asserted in that motion were as follows:

> 1. The pertinent counts of the indictment herein whereupon the judgment of guilty was imposed are duplicit*ious.*
>
> 2. The sentence and fine are in excess of that authorized by law.
>
> 3. The equitable considerations occurring subsequent to sentence, and therefore, without the knowledge of the Court.

On December 27, 1956 the District Court heard argument of counsel with respect to said motion, and sentenced the defendant to one year under counts 2 and 3 of the indictment, to run concurrently, and fined the defendant $1,000 on each count, or a total of $2,000.

The purpose of the present motion and of this affidavit in support of the motion is to enlarge the scope and purpose of the preceding motion to correct or reduce sentence, and to point out the invalidity of the sentence, as hereinafter set forth, thus presenting a proper and complete record for this Court upon which to resolve this appeal.

[fol. 49] The indictment was brought under the provisions of the Internal Revenue Code of 1939. Section 145(b) of the Internal Revenue Code of 1939 provided in part:

> "Any person . . . who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Under the same Internal Revenue Code of 1939, Section 3616(a) provided in part that any person who

> "Delivers or discloses to the collector or deputy any false or fraudulent . . . return, . . . with intent to defeat or evade the . . . assessment intended to be made . . . shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Said Section 3616(a) has been amended under the Internal Revenue Act of 1954 by omitting the phrase "with intent to defeat or evade" from the present Section, which is now numbered 7207.

On April 30, 1956, the Supreme Court delivered its opinion in *Berra* v. *United States* (351 U. S. 131, 76 S. Ct. 685), a case involving the construction of Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939. The Court had granted certiorari limited to the question of whether it was error for the Trial Judge to refuse to give a requested instruction that the jury might return a verdict of guilty of the "lesser crime" under Section 3616(a) even though the indictment was specifically brought under Section 145(b). The Court affirmed, pointing out:

> "The only question before us is whether the jury should have been allowed to decide whether it would apply § 3616(a) rather than § 145(b), and that we hold was not for the jury. It was, therefore, not error to refuse the requested instruction."

[fol. 50] In the majority opinion, Mr. Justice Harlan stated:

> ". . . here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner 'wilfully' attempted to evade taxes by filing a false return (§ 145(b)) were identical with those required to prove that he delivered a false return with 'intent' to evade taxes (§ 3616(a)). In this instance Sections 145(b) and 3616(a) covered precisely the same ground."

And Mr. Justice Harlan specifically noted:

> "No motions addressed to the validity of the indictment, judgment or conviction, or sentence under § 145(b) were made before, during or after trial."

Stating that the Supreme Court itself should "reverse this case or at least remand for resentencing under the misdemeanor statute, § 3616(a)," Mr. Justice Black, in a dissenting opinion in which Mr. Justice Douglas joined, pointed out that:

> "Although § 3616(a) unambiguously makes the conduct charged a misdemeanor punishable by no more than one year in prison, the trial judge apparently felt that he was compelled to treat the offense as a felony because of the statement in the indictment that the conduct charged was in violation of Section 145(b)."

and added the following footnote:

> "But see Williams v. United States, 168 U. S. 382, 389; United States v. Hutcheson, 312 U. S. 219, 229; Fed. Rules Crim. Proc., 7(c), which provides in part that: 'The indictment . . . shall state for each count the official or customary citation of the statute . . . which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment . . . or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.' Cf. Cole v. Arkansas, 333 U. S. 196."

Referring to the majority opinion, Mr. Justice Black, in a footnote, stated:

> "Apparently the Court means by this to leave open to petitioner the opportunity to challenge his sentence by a motion to correct it under 23 U. S. C. § 2255. Of course I agree that a motion under that section would be appropriate, but I think petitioner is entitled to have it settled now."

[fol. 51] Mr. Justice Black further stated:

> "The Government admits here and the Court assumes that filing a false and fraudulent income tax return is both a misdemeanor under § 3616(a) and a felony under § 145(b). The Government argues that the action of the trial judge must be upheld because 'the Government may choose to invoke either applicable law,' and "the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.' Election by the Government of course means election by a prosecuting attorney or the Attorney General. I object to any such interpretation of §§ 145 and 3616. I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual —a result which seems to me to be wholly incompatible with our system of justice. Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of § 145(b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly."

Mr. Justice Black then pointed out a basic principle of American law:

> "A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statues can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General. 'For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' Yick Wo v. Hopkins, 118 U. S. 356, 370.
>
> ". . . A judge and jury act under procedural rules carefully prescribed to protect the liberty of the in-

dividual. Their judgments and verdicts are reached after a public trial in which a defendant has the right to be represented by an attorney. No such protections are thrown around decisions by a prosecuting attorney. Substitution of the prosecutor's caprice for the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command. Our system of justice rests on the conception of impersonality in the criminal law. This great protection to freedom is lost if the Government is right in its contention here."

[fol. 52] The Government itself, in its brief in the *Berra* case, admits that "Section 3616(a) has frequently been utilized by the Government in the prosecution of income tax cases" (page 23 of brief filed in the Supreme Court).

On January 28, 1957 the Supreme Court granted certiorari in the *Frank Costello* case, Docket No. 666 in the Supreme Court. The question there presented to the Supreme Court is identical to the question raised on the motion to correct or reduce sentence heretofore filed in the District Court on November 26, 1956, and as now presented by the present motion and the affidavit. In the Government's memorandum, in which the Government did not oppose the granting of the petition for certiorari, it is stated at page 2:

> "The filing of a false and fraudulent return with intent to evade tax is also made a misdemeanor, punishable by imprisonment not exceeding one year and by fine not exceeding $1,000, by Section 3616(a) of the 1939 Code; and the latter section clearly applies to all federal tax returns, including income tax. In the instant case, as in *Berra* v. *United States*, 351 U. S. 131, and indeed almost every case prosecuted under Section 145(b), the proof that the defendant wilfully attempted to evade taxes by filing a false return is identical with that required to prove that he filed a false return with intent to evade tax, in violation of Section 3616(a). In this respect Sections 145(b) and 3616(a) overlap."

The defendant here asserts that where Congress has made the specific offense of delivering or filing a false and

fraudulent income tax return, with intent to defeat or evade the assessment, a misdemeanor punishable by a $1,000 fine or imprisonment not exceeding one year, or both, neither the Court nor the prosecutor may resort to the general language of a felony statute in order to increase the punishment where the indictment alleges that the defendant filed a false and fraudulent income tax return with intent to evade and defeat taxes or assessments. Thus any sentence [fol. 53] of more than a $1,000 fine or imprisonment for more than one year is in violation of his constitutional rights, especially those rights granted him under the Fifth, Sixth and Eighth Amendments.

Indeed, it is the defendant's alternative position in this motion to vacate sentence and this affidavit, that no conviction under either provisions because of the overlap of Sections 145(b) and 3616(a) is valid, because the two, when taken together in the context of this case, pose an inconsistency so great that it is a task outside the bounds of judicial interpretation (*United States* v. *Evans*, 333 U. S. 483.) If the two provisions may coexist, then only the less harsh of the two may be applied in this case.

The defendant now moves this Court for the entry of an order granting defendant leave to file this affidavit as part of the record in this cause, establishing the additional grounds here asserted for the invalidity of said sentence, this affidavit and motion to stand as a motion to vacate, set aside and correct that part of the sentence which imposed a one year imprisonment and a fine totaling $2,000.00, upon the grounds that such part of the sentence was imposed in violation of the Constitution and the laws of the United States, that the Court was without jurisdiction to impose such part of the sentence, and that such part of the sentence was in excess of the maximum authorized by law.

The motion now made is for the purpose of making clear the defendant's allegations as to the invalidity of the sentence originally imposed and of the sentence imposed on December 27, 1956, unless this Court shall determine in this appeal that the sentence was imposed under Section [fol. 54] 3616(a). In this latter case, there is left for decision the question of whether or not the District Court has jurisdiction to impose any sentence whatsoever, in view of

the inconsistency and overlap of the two sections as herein mentioned.

Peter B. Atwood.

Subscribed and sworn to before me this 12th day of February, 1957. Gladys M. Wolff, Notary Public, Cook County, Illinois. My Commission expires: May 21, 1959. (Seal.)

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[fol. 55] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

[Title omitted]

GOVERNMENT'S OBJECTIONS TO DEFENDANT-APPELLANT'S MOTION TO ENLARGE GROUNDS HERETOFORE ASSERTED IN THE COURT BELOW—Filed February 21, 1957

The United States of America, Plaintiff-Appellee, by R. Tieken, United States Attorney, makes the following objections to Defendant-Appellant's motion to enlarge grounds heretofore asserted in the District Court to vacate sentence.

1. There is no jurisdiction to enlarge grounds upon which a motion is predicated after a notice of appeal is filed from an order thereon.

2. The appellate function does not encompass amendment or enlargement of grounds upon which a motion is predicated as at nisi prius.

3. To permit such enlargement would be in effect to grant Defendant-Appellant a trial de novo before the appeal is concluded.

4. The Defendant-Appellant's motion is based on sophisms and etiological refinements in a belated attempt to expand the grounds of his motion made below and now on appeal.

5. The doctrine of diminution of the record does not apply

to afterthoughts of counsel or to matters not presented to the Court below.

[fol. 56] 6. The Defendant-Appellant's motion as expanded by the affidavit attached thereto at most is but cumulative and proliferative of Defendant-Appellant's contention in the Court below.

Wherefore, it is respectfully submitted that the Defendant-Appellant's motion be stricken or alternatively that the relief sought thereunder be denied.

Respectfully submitted, R. Tieken, United States Attorney, John Peter Lulinski, Assistant United States Attorney, Vincent P. Russo, Special Attorney, Department of Justice.

JPL:ak

[File endorsement omitted.]

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[fol. 57] Affidavit of mailing (omitted in printing).

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[fol. 58] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

[Title omitted]

NOTICE OF MOTION—Filed March 6, 1957

To: Hon. R. Tieken, Esq.
United States Attorney
450 United States Courthouse
Chicago 4, Illinois,
Attorney for Plaintiff-Appellee.

Sir:

Please take notice that I shall file in the Court of Appeals for the Seventh Circuit, 1212 Lake Shore Drive, Chicago, Illinois, on March 6, 1957, a motion for the entry of an

order directing the Clerk of said Court to certify the record in the above entitled cause now on appeal, as filed in said Court of Appeals from the District Court of the United States, and as supplemented by a motion to consolidate the record in this appeal with the appeal heretofore filed as Docket No. 11575, and by a further motion heretofore filed on February 12, 1957 to enlarge the grounds heretofore urged before the District Court in this cause for vacating, setting aside and correcting the sentence entered by the District Court on December 27, 1956, together with plaintiff-appellee's objections thereto.

Dated at Chicago, Illinois, March 5, 1957.

Peter B. Atwood, 10 South LaSalle Street, Chicago 3, Illinois, Attorney for Defendant-Appellant.

Received a copy of the above and foregoing notice, together with a copy of the motion therein mentioned, this —— day of March, 1957.

R. Tieken, United States Attorney, Attorney for Plaintiff-Appelee.

[File endorsement omitted.]

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[fol. 59] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

[Title omitted]

EMERGENCY MOTION TO CERTIFY RECORD FOR PETITION FOR CERTIORARI BEFORE JUDGMENT—Filed March 6, 1957

Now comes Peter B. Atwood, counsel for Sam Achilli, defendant-appellant in the above entitled cause, and respectfully moves the Court for the entry of an order directing the Clerk of this Court to certify the record in the above entitled cause now on appeal, as filed in this Court from the

District Court of the United States and as supplemented by a motion to consolidate the record in this appeal with the appeal heretofore filed as Docket No. 11575, and by a further motion heretofore filed on February 12, 1957 to enlarge the grounds heretofore urged before the District Court in this cause for vacating, setting aside and correcting the sentence entered by the District Court on December 27, 1956, together with plaintiff-appellee's objections thereto; and in support thereof, states:

1. The United States Supreme Court on March 4, 1957 entered an order withdrawing its denial of certiorari in this cause on November 14, 1956, and at the same time placed this cause on its Summary Calendar.

[fol. 60] 2. Counsel for Sam Achilli has informed the Clerk of the Supreme Court of the United States that he will promptly file a new petition for certiorari, accompanied by a certified copy of the record as it now stands before this Court.

3. Rule 20 of the Rules of the Supreme Court of the United States provides for the filing of a petition for certiorari before judgment by a Court of Appeals, and the new petition for certiorari will be filed pursuant thereto.

Respectfully submitted, Peter B. Atwood, 10 South LaSalle Street, Chicago 3, Illinois, Attorney for Defendant-Appellant.

March 5, 1957.

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[fol. 61] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Before Hon. Walter C. Lindley, Circuit Judge

[Title omitted]

ORDER DENYING MOTION TO ENLARGE GROUNDS, ETC.—March 8, 1957

It is ordered that the motion of counsel for defendant-appellant to enlarge grounds heretofore asserted in the Dis-

trict Court to vacate sentence, filed herein on February 13, 1957, be, and the same is hereby, denied.

It is further ordered that the motion of counsel for defendant-appellant, filed herein on February 13, 1957, to consolidate record, be granted; and it is ordered that the record heretofore filed in this appeal be consolidated with the printed record filed in the prior appeal in this cause, namely Docket No. 11575.

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[fol. 62] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Friday, March 8, 1957

Before Hon. Walter C. Lindley, Circuit Judge

ORDER CONTINUING CASE, ETC.—March 8, 1957

On consideration of the motion and affidavit of counsel for defendant-appellant, filed herein on February 19, 1957, it is ordered that the above entitled appeal be continued generally, and the time within which defendant-appellant may file his appendix and brief otherwise due, according to Rules of this Court, on March 11, 1957, be also continued generally.

On consideration of the emergency motion of counsel for defendant-appellant to certify record for petition for certiorari before judgment, filed herein on March 6, 1957, it is ordered that the Clerk of this Court be directed to certify the record in the above entitled cause, now on appeal, as filed in this Court from the District Court of the United States and as supplemented by order to consolidate the record in this appeal with the appeal heretofore filed as Docket No. 11575, to the Supreme Court of the United States.

[fol. 63] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ———— pages contain a true copy of the Motion to Consolidate Record, filed February 13, 1957, Motion to Enlarge Grounds heretofore asserted in the District Court to Vacate Sentence, filed February 13, 1957, Government's Objections to Defendant-Appellant's Motion to Enlarge Grounds heretofore asserted in the Court below, filed February 21, 1957,

Emergency Motion to Certify Record for Petition for Certiorari before Judgment, filed March 6, 1957, and Orders, entered March 8, 1957, in

Cause No. 11971

THE UNITED STATES OF AMERICA, Plaintiff-Appellee

vs.

SAM ACHILLI, Defendant-Appellant

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighth day of March A. D. 1957.

Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit. By: R. Hays Blanchard, Chief Deputy Clerk.

[fol. 64] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 834

SAM ACHILLI, Petitioner

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI.—Filed March 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is consolidated with No. 430.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Whittaker took no part in the consideration or decision of this application.

(4637-5)